



Agricultural Marketing Service

7 CFR Part 946

[Doc. No. AMS-SC-20-0095; SC21-946-1 PR]

Termination of the Marketing Order for Irish Potatoes Grown in Washington State

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on the proposed termination of the Federal marketing order regulating the handling of Irish potatoes grown in Washington, and the rules and regulations issued thereunder. The marketing order is administered locally by the State of Washington Potato Committee (Committee), which unanimously recommended its termination at a meeting held on June 11, 2020. This recommendation is based on the Committee's determination that the marketing order is no longer an effective marketing tool for the Washington potato industry and that termination would best serve the current needs of the industry by eliminating the cost associated with its operation.

DATES: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be submitted to the Docket Clerk electronically by Email:

MarketingOrderComment@usda.gov or internet:

<https://www.regulations.gov>. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and can be viewed at:

<https://www.regulations.gov>. All comments submitted in response to this proposal will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Gregory A. Breasher, Marketing Specialist, or Gary Olson, Regional Director, Northwest Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326-2054 or Email: Gregory.Breasher@usda.gov or GaryD.Olson@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes the termination of regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing

Order No. 946, as amended (7 CFR part 946), regulating the handling of potatoes grown in Washington. Part 946 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Committee locally administers the Order and is comprised of producers and handlers operating within the production area.

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

In addition, this proposed rule has been reviewed under Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal

implications. The Agricultural Marketing Service (AMS) has determined this proposed rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15) (A) of the Act, any handler subject to a marketing order may file with USDA a petition stating that the marketing order, any provision of the marketing order, or any obligation imposed in connection with the marketing order is not in accordance with law and request a modification of the marketing order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule proposes to terminate the Order and rules and regulations issued thereunder. The Order contains authority for the regulation of Irish potatoes grown in Washington. At a virtual meeting held on June 11, 2020, the Committee unanimously recommended termination of the Order.

Section 946.63(b) of the Order provides that USDA terminate or suspend any or all provisions of the Order when a finding is made that the Order does not tend to effectuate the declared policy of the Act. In addition, section 608c(16)(A) of the Act provides that USDA terminate or suspend the operation of any order whenever the order or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act. Additionally, USDA is required to notify Congress no later than 60 days before the date on which the Order would be terminated.

Marketing Order No. 946 has been in effect since 1949 and has provided the potato industry in Washington with authority for grade, size, quality, maturity, pack, and container regulations, as well as authority for mandatory product inspection. The Committee has met regularly to evaluate the current status of the Washington potato industry and to consider recommendations for modification, suspension, or termination of the Order's regulatory requirements, which have been issued on a continuing basis. Committee meetings are open to the public and interested

persons may express their views at these meetings. The USDA reviews Committee recommendations, including information provided by the Committee and from other available sources, and determines whether modification, suspension, or termination of the Order's regulatory requirements would tend to effectuate the declared policy of the Act.

Handling regulations requiring potatoes to be inspected and meet mandatory minimum grade, size, maturity, quality, pack, and container requirements were in effect for all types of potatoes until 2010. USDA temporarily suspended handling regulations for Russet type potatoes for one-year, effective July 24, 2010 (75 FR 43042), and subsequently extended that suspension indefinitely effective July 1, 2011 (76 FR 27850). Further, USDA temporarily suspended handling regulations for yellow fleshed and white type potatoes effective October 24, 2013 (78 FR 62967), also extending that suspension indefinitely effective July 1, 2014 (79 FR 26109). Lastly, USDA indefinitely suspended handling regulations for all red types of potatoes effective February 15, 2014 (79 FR 8253). The cumulative effect of these suspensions was the total suspension of handling regulations for all fresh potatoes under the Order after July 1, 2014. All suspensions listed above were conducted upon the recommendation of the Committee.

Following these regulatory suspensions, the Committee continued to levy assessments in order to maintain its functionality. The Committee felt that it should continue to fund its full operational capability in order to collect handler reports, track industry data, and preserve the authority to regulate handling, should that become relevant to the industry again sometime in the future.

The Committee met on January 22 and June 11, 2020, to discuss the current marketing environment of the Washington potato industry and the status of the Order. The Committee determined that the suspension of the Order's handling regulations have not negatively impacted the industry and that there is no longer a need for the Order. In addition, the Committee concluded that data collection and reporting functions of the Order are duplicative of the services provided to the industry by the Washington State Potato Commission and that termination of the Order would not materially impact the collection and dissemination of essential industry data.

At the meeting held via conference call on June 11, 2020, the Committee unanimously voted in favor of recommending that USDA to terminate the Order. In addition, the Committee recommended the Order's reporting and assessment requirements - the only regulatory activities still in effect - be suspended while USDA processes termination of the Order. The recommendation to

suspend all remaining Order activities is a separate regulatory action from this rule. A proposed rule to suspend the Order's reporting and assessment requirements was published in the **Federal Register** October 13, 2020 (85 FR 64415).

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS has considered the economic impact of this proposed rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 26 handlers of Washington potatoes and approximately 250 potato producers in the production area subject to regulation by the Order.

Small agricultural service firms are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$30,000,000, and small agricultural producers are defined as those having annual receipts of less than \$1,000,000 (13 CFR 121.201).

According to USDA Market News, the average shipping point price for fresh Washington potatoes during the 2019 shipping season was approximately \$15.79 per hundredweight. The Committee reported that 2019-2020 marketing year fresh potato shipments were 9,687,170 hundredweight. Using the average price and shipment information, the number of handlers, and assuming a normal distribution, most handlers had average annual receipts of less than \$30,000,000 (\$15.79 times 9,687,170 hundredweight equals \$152,960,414, divided by 26 handlers equals \$5,883,093 per handler). Thus, AMS concludes that the majority of handlers would meet the SBA definition of a small business.

USDA National Agricultural Statistics Service reported an average producer price of \$8.20 per hundredweight for the 2019 crop. Given the number of Washington potato producers and assuming a normal distribution, average annual producer revenue is below \$1,000,000 (\$8.20 times 9,687,170 hundredweight equals \$79,434,794, divided by 250 producers equals \$317,739 per producer). Therefore, most producers of fresh Washington potatoes may be classified as small businesses under the SBA definition.

This rule proposes to terminate the Federal marketing order for Irish potatoes grown in Washington, and rules and regulations issued thereunder. The Order contains authority to regulate the handling of Irish potatoes grown in Washington. The Committee determined that regulating

the handling of potatoes under the Order is no longer an effective marketing tool for the Washington potato industry. Evidence from the past 6 years of operating with suspended handling regulations showed that potatoes can be shipped from the production area in the absence of the Order's minimum requirements without a negative economic impact on the industry.

Secondly, the Committee determined that the data collection and reporting function of the Order is duplicative of the services provided to the industry by the Washington State Potato Commission. The termination of the Order would not materially impact the collection and dissemination of essential industry data to Washington State potato growers.

As such, the Committee concluded that the cost associated with the administration of the Order outweigh benefits of continuing the Order. This conclusion is based on the Committee's analysis of the 6-year period of regulatory suspension and findings that termination is not expected to negatively impact the marketing of fresh Washington potatoes because this action reduces costs to both handlers and producers. Therefore, in an action taken on June 11, 2020, the Committee unanimously recommended that USDA terminate the Order.

Section 946.63(b) of the Order provides that USDA to terminate or suspend any or all provisions of the Order

when a finding is made that the Order does not tend to effectuate the declared policy of the Act. Furthermore, § 608c(16) (A) of the Act provides that USDA shall terminate or suspend the operation of any order whenever the order or provision thereof obstructs or does not tend to effectuate the declared policy of the Act. An additional provision requires that Congress be notified not later than 60 days before the date on which order would be terminated.

The Committee considered alternatives to this rule, including taking no action (which would keep the Order active but with the handling regulations suspended) and suspending all of the Order's remaining regulatory provisions but not terminating the Order. The Committee determined that neither option was a viable long-term solution, and subsequently, recommended that the Order be terminated.

This proposed rule is intended to solicit input and other available information from interested parties on whether the Order should be terminated. USDA will evaluate all available information prior to making a final action on this matter.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0178 Vegetable and Specialty Crops. Termination of the Order and reporting requirements

prescribed therein, would reduce the reporting burden on Washington potato handlers by an estimated 9.7 hours per handler. Handlers would no longer be required to file forms with the Committee, which is expected to reduce industry expenses. This rule would not impose any additional reporting or recordkeeping requirements on either small or large potato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Committee meetings are widely publicized throughout the Washington potato industry, and all interested persons are invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the January 22 and June 11, 2020, meetings were public meetings, and all entities, both large and small, were able to express their views on these issues.

Interested persons are invited to submit comments on this proposed rule, including regulatory and information

collection impacts of this proposed action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on the proposed termination of Marketing Order 946, which regulates the handling of Irish potatoes grown in Washington. A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final action is made on this matter.

Based on the foregoing and pursuant to § 608c(16) (A) of the Act and § 946.63 of the Order, USDA is considering termination of the Order. If USDA decides to terminate the Order, trustees would be appointed to conclude and liquidate the Committee affairs and would continue in that capacity until discharged by USDA. In addition, USDA would notify Congress 60 days in advance of termination pursuant to § 608c(16) (A) of the Act.

List of Subjects in 7 CFR Part 946

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, part 946 is proposed to be removed.

PART 946 - IRISH POTATOES GROWN IN WASHINGTON - [REMOVED]

1. The authority citation for part 946 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Accordingly, part 946 is removed.

Erin Morris, Administrator,
Agricultural Marketing Service.

[FR Doc. 2021-19238 Filed: 9/3/2021 8:45 am; Publication Date: 9/7/2021]